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Mallard v. United States District Court: Relying on a Definition but Failing to Define the Rights of Court-Appointed Attorneys

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Note

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I. INTRODUCTION

The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[1] The United States Supreme Court has "construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived."[2] Thus, the sixth amendment operates to ensure that a defendant's constitutionally mandated rights are protected in actions by the state against the criminal defendant. In order to provide a criminal defendant with counsel, the Court has recognized the inherent power of a federal court to appoint counsel.[3]

While the Constitution and the Supreme Court have squarely faced

1. U.S. CONST. amend. VI.
2. Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963).
3. Powell v. Alabama, 287 U.S. 45, 73 (1932).

the question of a criminal defendant's right to counsel and the inherent power of federal courts to appoint such counsel, the right of an indigent civil litigant is not so clearly defined. This Note examines the Supreme Court's recent attempt in *Mallard v. United States District Court*[4] to answer the question whether a federal court, pursuant to 28 U.S.C. § 1915(d), may compel an unwilling attorney to represent an indigent civil litigant. Following an examination of the Court's opinion in *Mallard*, the discussion will focus on the questions the Court left unanswered. While the Court was faced with the opportunity to resolve the question of mandatory appointments of counsel for indigent civil litigants, it instead chose to step out of harm's way, leaving unanswered questions whose resolutions are needed today.

II. MALLARD: DEFINING THE WORD "REQUEST"

In *Mallard*, the Supreme Court was asked to decide "whether 28 U.S.C. § 1915(d) authorizes a federal court to require an unwilling attorney to represent an indigent litigant in a civil case."[5] Section 1915(d) provides that "[t]he court may request an attorney to represent any [person claiming in forma pauperis status] unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."[6] The Court of Appeals for the Eighth Circuit, in *Nelson v. Redfield Lithograph Printing*,[7] directed that "the chief judge of each district . . . seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations."[8]

In response to the Eighth Circuit's directive, the District Court for the Southern District of Iowa prepared and maintained a list of attorneys in good standing admitted to practice before the district court.[9] Attorneys are assigned to cases in the district according to the following procedure. Once the district court determines that an indigent party qualifies for representation under section 1915(d), a copy of the case file is forwarded to the Volunteer Lawyer Project ("VLP").[10] Using the list of available attorneys prepared by the district court, VLP selects an attorney for section 1915(d) appointments.[11] An attorney

4. 109 S. Ct. 1814 (1989).
5. *Id.* at 1816.
6. 28 U.S.C. § 1915(d)(1988).
7. 728 F.2d 1003 (8th Cir. 1984).
8. *Id.* at 1005.
9. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1816 (1989).
10. The Volunteer Lawyers' Project is a joint venture of the Iowa State Bar Association and the Legal Services Corporation of Iowa.
11. In February of 1986, the Iowa State Bar Association sent a letter to all lawyers licensed to practice before the United States District Courts for

appointed pursuant to section 1915(d) may be eligible for out-of-pocket expenses and any fee provided by statute. However, an attorney is "not guaranteed even minimal compensation" for the services provided.[12]

In addition to "selecting" the attorney to be appointed in section 1915(d) cases, VLP offers assistance to selected attorneys who are unfamiliar with civil rights litigation. Such assistance includes providing the attorney with written materials, offering seminars, and providing consultations with attorneys familiar with the specific area of law involved in the case.[13]

In *Mallard*, two inmates and one former inmate of the Iowa State Penitentiary collectively brought an action pursuant to 42 U.S.C. § 1983[14] alleging that prison officials had proceeded with false disciplinary procedures against them, physically abused them, and endangered their lives by exposing them as informants.[15]

In June 1987, following an order by the district court to appoint counsel for the indigent plaintiffs, VLP contacted John Mallard and requested that he represent the plaintiffs. According to Mallard, he never agreed to represent the plaintiffs, but did receive the case file in order to learn more about the specific issues involved in the case.

Following Mallard's review of the case file and within one month of being contacted by VLP, Mallard filed a motion to withdraw with the district court. Mallard based his motion to withdraw on the grounds that (1) representation of the plaintiffs would involve substantial discovery by deposition and a trial with many parties and witnesses; (2) counsel for plaintiffs would need to examine and cross-examine numerous parties and witnesses; and (3) Mallard was not competent to undertake such representation.[16] As a basis for the fore-

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the Northern and Southern Districts of Iowa describing the referral system. According to the letter, 130 appointments were made between June 1984 and June 1985. The combined lists for both districts embraced roughly 3,500 lawyers. Each lawyer was eligible to be chosen every third year, making her odds of being selected roughly one in nine in those years.

Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1817 n.1 (1989).

12. *Id.* at 1817.
13. *Id.*
14. 42 U.S.C. § 1983 (1988). This statute provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

15. Petitioner's Brief at 7-8, Mallard v. United States Dist. Court, 109 S. Ct. 1814 (1989)(No. 87-1490).
16. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1817 (1989).

going assertions, Mallard claimed that his legal experience rested in business and securities law and that his "courtroom experience was limited to the representation of creditors in debt collection and bankruptcy proceedings."[17]

The motion to withdraw was denied by the magistrate. Mallard appealed this decision to the district court. In his appeal, Mallard reasserted his unfamiliarity with litigation, specifically with litigation under 42 U.S.C. § 1983, as grounds to grant his motion to withdraw. Additionally, Mallard argued that "[f]orcing him to represent indigent inmates in a complex action requiring depositions and discovery, cross-examination of witnesses, and other trial skills, . . . would compel him to violate his ethical obligation to take only those cases he could handle competently and would exceed the court's authority under § 1915(d)."[18]

Despite Mallard's plea to be released from representing the plaintiffs in the civil action, the district court determined that his brief in support of the motion to withdraw evidenced that Mallard was competent to act as counsel in the action. Accordingly, the court concluded he was competent to represent the civil rights litigants. Additionally, the district court held that section 1915(d) empowers federal courts to compel unwilling attorneys to represent indigent civil litigants and affirmed the magistrate's order denying the motion to withdraw.[19]

Not only did Mallard lose the first two battles with the magistrate and the district court, but in the third battle before the Eighth Circuit he suffered defeat once more. Mallard sought a writ of mandamus from the Court of Appeals for the Eighth Circuit to compel the district court to grant his motion to withdraw. However, the court of appeals denied the petition without comment.

Following the denial of the writ of mandamus by the Eighth Circuit, Mallard petitioned the United States Supreme Court for certiorari to determine whether an attorney can be compelled to represent a plaintiff in a civil rights case when the attorney believes he is incompetent to do so. The Supreme Court granted certiorari in order "to resolve a conflict among the Courts of Appeals over whether § 1915(d) authorizes compulsory assignments of attorneys in civil cases."[20]

Mallard took his fight to the Court by attacking the Eighth Circuit's interpretation of section 1915(d). Mallard asserted that the

17. *Id.*
18. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1817 (1989).
19. *Id.*
20. *Id. Compare, e.g.*, United States v. 30.64 Acres of Land, 795 F.2d 796, 801-03 (9th Cir. 1986); Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983)(section 1915(d) does not authorize compulsory appointments) *with, e.g.*, Whisenant v. Yuam, 739 F.2d 160, 163 n.3 (4th Cir. 1984)(section 1915(d) permits mandatory assignments); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971).

Eighth Circuit stood alone among the courts of appeals in construing section 1915(d) as granting a federal court the authority to require unwilling attorneys to represent indigent litigants in civil cases. Specifically, Mallard argued that the plain meaning of the word "request" as contained in the statute prevented a federal court from relying thereon to require an unwilling attorney to serve.[21]

While Mallard attacked the statutory interpretation given section 1915(d) by the Eighth Circuit, he also advanced arguments under theories of (1) the due process and taking clauses of the fifth and fourteenth amendments; (2) involuntary servitude pursuant to the thirteenth amendment; and (3) freedom of speech as protected by the first amendment. The Court, however, rested its opinion on the narrow issue of statutory construction.

Justice Brennan delivered the opinion of the Court.[22] The Court first addressed the question of statutory interpretation. The Court has repeatedly stated that the interpretation of a statute must begin with the statute's language, construing the statute in the manner in which the language used is typically understood.[23] Section 1915(d) states that "the court may request an attorney to represent" an indigent litigant.[24]

> The import of the term seems plain. To request that somebody do something is to express a desire that he do it, even though he may not generally be disciplined or sanctioned if he declines. Of course, somebody who frequently refuses another person's requests might not win that person's favor. . . . In everyday speech, the closest synonyms of the verb "request" are "ask", "petition," and "entreat." The verbs "require" and "demand" are not usually interchangeable with it.[25]

While Justice Brennan concluded that the plain meaning of "request" was the usage intended by Congress, as additional support for this conclusion Justice Brennan compared the language of section 1915(c) with the language of section 1915(d). Section 1915(c), which was enacted at the same time as section 1915(d) states: "The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases."[26]

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21. Petitioner's Brief at 15-24, Mallard v. United States Dist. Court, 109 S. Ct. 1814 (1989)(No. 87-1490).
22. Justice Brennan was joined by Chief Justice Rehnquist and Justices White, Scalia and Kennedy. Justice Kennedy filed a concurring opinion. Justice Stevens filed a dissenting opinion, in which Justices Marshall, Blackmun, and O'Connor joined.
23. *See* United States v. Ron Pair Enters., 489 U.S. 235, 240-41 (1989); Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985).
24. 28 U.S.C. § 1915(d)(1988).
25. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1818 (1989)(quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1929 (3d ed. 1981); BLACK'S LAW DICTIONARY 1172 (5th ed. 1979)).
26. 28 U.S.C. § 1915(c)(1988).

In section 1915(c), Congress, with its use of the word "shall," mandated the duties of court officers and witnesses. In section 1915(d), on the other hand, Congress only empowered the federal courts to "request" an attorney to represent an indigent civil litigant. "Congress evidently knew how to require service when it deemed compulsory service appropriate."[27] Further evidence of Congress' intent not to compel attorneys to provide representation under section 1915(d) is found in the record of the House Debate concerning compulsory service of court officers:

> We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much ex-officio service.[28]

While the congressional record specifically addressed the purpose of the compulsory language of section 1915(c), the record was silent as to section 1915(d), which strengthens the Court's finding that section 1915(d) was intended by Congress to authorize federal courts to request, rather than require, an attorney to serve.[29] Justice Brennan concluded that when the plain meaning of "request" is viewed in conjunction with the mandatory language of section 1915(c), it is clear that Congress "did not intend § 1915(d) to license compulsory appointments of counsel."[30]

Justice Brennan supported this conclusion by examining the historical context in which Congress approved section 1915(d).[31]

> By the late 19th century, at least 12 states had statutes permitting courts to assign counsel to represent indigent litigants. The Congress that adopted § 1915(d) was undoubtedly aware of those statutes, for the brief and otherwise unilluminating Report of the House Judiciary Committee states that the bill containing § 1915(d) was designed to enable persons unable to afford legal representation to avail themselves of the courts, as "[m]any humane and enlightened states" that had similar laws allowed them to do.[32]

However, "none of those state statutes . . . provided that a court could merely request that an attorney serve without compensation."[33] In

27. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1818 (1989).
28. *Id.* at 1818 n.3 (quoting 23 CONG. REC. 5199 (1892)).
29. *Id.* at 1818.
30. *Id.*
31. *Id.* Writing for the dissent, Justice Stevens reached the opposite conclusion under the same facts:

> In 1892, state courts had statutory authority to order lawyers to render assistance to indigent civil litigants in a dozen States, and common law power to appoint counsel in at least another 10 States. Congress intended to "open the United States Courts' to impoverished litigants and "to keep pace" with the laws of these "[m]any humane and enlightened states."

Id. at 1825 (Stevens, J., dissenting)(quoting H.R. REP. NO. 1079, 52d Cong., 1st Sess., 1-2 (1892)).
32. *Id.* at 1818-19 (citing H.R. REP. NO. 1079, 52d Cong., 1st Sess., 2 (1892)).
33. *Id.*

fact, all of them empowered a court with authority to "assign" or "appoint" counsel.[34]

> To the extent that the "assignment" or "appointment" of counsel denotes the imposition of a duty to undertake representation that courts may enforce, Congress' decision to allow the federal courts to do no more than "request" attorneys to serve, in full awareness of more stringent state practices, seems to evince a desire to permit attorneys to decline representation of indigent litigants if in their view their personal, professional, or ethical concerns bid them to do so.[35]

Accordingly, had Congress intended section 1915(d) to empower courts to appoint or assign counsel to serve, it could have simply mirrored the language of the state statutes already enacted which empowered state courts with such authority.

The arguments presented thus far by Justice Brennan are sound and support the majority's holding that section 1915(d) does not empower courts to make coercive appointments of counsel. However, Justice Brennan had one final argument remaining in support of the Court's decision. To further support the Court's conclusion, Justice Brennan compared federal statutes which were passed prior to, and following, the enactment of section 1915(d).

Only one federal statute was passed prior to the enactment of section 1915(d) dealing with appointment of counsel. This statute provided for court-appointed counsel to a criminal defendant accused of a capital crime: "[T]o make his full defense by counsel learned in the law . . . the court before whom such person shall be tried, or some judge thereof, shall . . . immediately, upon his request . . . assign to such person such counsel, not exceeding two, as such person shall desire . . . ."[36] Relying upon the language of the foregoing statute, Justice Brennan stated:

> [W]hen Congress enacted § 1915(d), the verb "assign" was already part of the federal statutory lexicon; Congress' decision to depart from prior usage in fashioning a rule for civil cases involving indigent litigants might be taken to display a reluctance to require attorneys to serve, even though Congress apparently mandated service in the much more serious case of criminal defendants facing the death penalty.[37]

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34. *Id.* at 1819 (citing ARK. STAT. § 1053 (1884)(assign); ILL. REV. STAT., ch. 26, § 3, (1884)(assign); IND. REV. STAT., vol. 2, pt. 2, ch. 1, art. 2, § 15 (1852)(assign); KY. STAT. § 884 (1915)(Act of May 27, 1892)(assign); MO. REV. STAT. § 2918 (1889)(assign); NEV. COMP. LAWS § 3126 (1900)(appointment of attorney in certain contract cases); N.J. GEN. STAT., vol. 2, Practice § 369, p. 2598 (1896)(enacted 1799)(assign); N. MEX. COMP. LAWS § 2289 (1884)(appointment of attorney to represent territory); 1876 N.Y. LAWS, ch. 448, art. 3, § 460 (assign); 1869 N.C. PUB. LAWS, ch. 96, § 2 (assign); TENN. CODE § 3980 (1858)(appoint and assign); TEX. REV. STAT., art. 1125 (1879)(appoint); VA. CODE ANN. § 3538 (1904)(appeared in 1849 Code)(assign)).

35. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1819 (1989).

36. *Id.* at 1820 (citing Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118 presently codified as amended at 18 U.S.C. § 3005 (1988))).

37. *Id.* at 1820-21.

> This inference finds additional support in Congress' actions subsequent to § 1915(d)'s enactment. Every federal statute still in force that was passed after 1892 and that authorizes courts to provide counsel states that courts may "assign" or "appoint" attorneys, just as did the 1790 capital representation statute.[38] Congress' decision to promulgate these apparently coercive representation statutes when § 1915(d) was already on the books and after it had been extended to cover criminal as well as civil cases . . . suggests that § 1915(d)'s use of "request" instead of "assign" or "appoint" was understood to signify that § 1915(d) did not authorize compulsory appointments. In any case, Congress' enactments after 1892 afford no reason to believe that the plain meaning of § 1915(d) is not its intended meaning.[39]

To summarize the foregoing discussion, the Court rested its conclusion that section 1915(d) does not authorize federal courts to compel attorneys to represent indigent civil litigants upon several grounds: (1) the plain meaning of the statutory language, "request"; (2) the contrast with the "shall" statutory language of section 1915(c), enacted concurrently with section 1915(d); (3) the historical context in which section 1915(d) was enacted; and (4) the use of mandatory language by Congress in federal statutes enacted prior to, and following, the enactment of section 1915(d).

The Court next addressed the two remaining contentions of the United States District Court for the Southern District of Iowa, specifically, (1) that interpreting section 1915(d) as only authorizing a court to "request" an attorney's service strips the statute of any purpose and thus makes the statute superfluous; and (2) that Mallard was not entitled to a writ of mandamus to the Eighth Circuit Court of Appeals.[40] A brief examination of each of these assertions, as well as the Court's response, will be beneficial to this discussion.

The district court asserted that section 1915(d) must be construed to empower a federal court to compel attorneys to represent indigent civil litigants, or the statute would be superfluous and useless. Additionally, the district court asserted that the power to request counsel to assist is already embodied in the court's authority without the statutory authorization.[41] In response, Justice Brennan stated:

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38. *Id.* at 1821. *See* 18 U.S.C. § 3006A (1988)(appoint; criminal defendant); 18 U.S.C. § 3503(c)(1988)(assign; criminal defendant at deposition to preserve testimony); 18 U.S.C. § 4109 (1988)(appoint; proceeding to verify offender's consent to transfer to or from United States); 25 U.S.C. § 1912(b)(1988)(appoint; Indiana child custody proceedings); 42 U.S.C. § 1971(f)(1988)(assign; defendant in voting rights case); 42 U.S.C. § 2000a-3(a)(1988)(appoint; complainant seeking injunction under civil rights laws); 42 U.S.C. § 2000e-5(f)(1)(1988)(appoint; title VII complainant); 42 U.S.C. § 3413(1)(1988)(assign; commitment of narcotic addict). *See also* FED. RULE CRIM. P. 44 (assign; criminal defendant). *Cf.* 10 U.S.C. § 827 (1988)(courts-martial shall "detail" trial counsel and defense counsel).

39. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1820-21 (1989).

40. Brief of Respondent in Opposition to Petition for Writ of Certiorari at 4-6, Mallard v. United States Dist. Court, 109 S. Ct. 1814 (1989)(No. 87-1490).

41. *Id.* at 7.

> Statutory provisions may simply codify existing rights or powers. Section 1915(d), for example, authorizes courts to dismiss a "frivolous or malicious" action, but there is little doubt they would have power to do so even in the absence of the statutory provision. Nor do respondent's premises compel its conclusion. Section 1915(d) plays a useful role in the statutory scheme if it informs lawyers that the court's requests to provide legal assistance are *appropriate* requests, hence not to be ignored or disregarded in the mistaken belief that they are improper, like a judge's request to cut short cross-examination so that he can go fishing. Section 1915(d) may meaningfully be read to legitimize a court's request to represent a poor litigant and therefore to confront a lawyer with an important ethical decision; one need not interpret it to authorize the imposition of sanctions should a lawyer decide not to serve in order to give purpose to the provision.[42]

Accordingly, the Court concluded that section 1915(d) simply codifies the inherent judicial authority to request attorneys to serve, and operates to legitimize this authority in the eyes of the attorney so requested.

Justice Brennan next turned to the district court's final argument, which notably should have been a threshold question, that Mallard failed to meet his burden of proof for a writ of mandamus.[43] The Court quoted *Roche v. Evaporated Milk Association*:

> The traditional use of the writ [of mandamus] in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or compel it to exercise its authority when it is its duty to do so.[44]

Additionally, a petitioner seeking a writ of mandamus must demonstrate a "clear abuse of discretion,"[45] or actions amounting to "usurpation of [judicial] power."[46]

In seeking a writ of mandamus, Mallard asserted that the district court wrongfully exercised its jurisdiction in appointing him to represent the indigent litigants.[47] The Court agreed and held that the court of appeals should have ordered the district court to grant Mallard's motion to withdraw.

Under the facts presented by Mallard, the Court concluded Mallard had met his burden of showing that his right to issuance of the writ was clear and indisputable. "In resting its decision solely on § 1915(d)—the only ground for decision properly before us—the District Court plainly acted beyond its 'jurisdiction' as our decisions have interpreted that term, for, as we decide today, § 1915(d) does not au-

42. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1821 (1989).
43. *Id.* at 1822.
44. *Id.* (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)).
45. *Id.* (quoting DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)).
46. *Id.* (quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953)).
47. *Id. See* Brief of Petitioner for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit at 4, Mallard v. United States Dist. Court, 109 S. Ct. 1814 (1989)(No. 87-1490).

thorize coercive appointments of counsel."[48]

Although, the Court held that section 1915(d) does not authorize coercive appointments of counsel, its decision fails to answer many of the questions arising from mandatory appointments of counsel.

> We emphasize that our decision today is limited to interpreting § 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to § 1915(d) may be lightly declined because they give rise to no ethical claim.[49]

In other words, the Court left unanswered many important questions relating to mandatory appointments of counsel.

III. MALLARD: QUESTIONS FOR ANOTHER DAY

It is questionable whether the decision of the Court in *Mallard* answers the question of an attorney's judicially imposed obligation to represent indigent civil litigants. While the Court disposed of the statutory interpretation of section 1915(d), it left unanswered important questions concerning the ability of federal courts to compel attorneys to represent indigents for little or no compensation.

The following discussion focuses on the relation of the legal profession with the federal court system. This relationship is analyzed within three areas: (1) the historical foundation of the officer of the court doctrine; (2) the justification for denial of an attorney's constitutional rights; and (3) the ethical dilemma presented by the responsibilities of an attorney to the legal profession. Each of these areas present potential grounds for an attorney to decline a court appointment and therefore require discussion when assessing the unanswered questions raised in *Mallard.*

A. Officer of the Court: The Weak Historial Foundation of an Over-Used Doctrine

The *Mallard* majority determined that section 1915(d) does not empower federal courts to compel attorneys to represent indigent civil litigants. However, it was a sharply divided Court which reached this decision. Additionally, Justices Brennan and Kennedy expressed the

48. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1822 (1989).

49. *Id.* at 1822-23. *See also id.* at 1822-23 nn.6 & 8. Additionally, Justice Kennedy, concurring, spoke to the narrow purpose of the Court's holding.

> Our decision today speaks to the interpretation of a statute, to the requirements of the law, and not to the professional responsibility of the lawyer. Lawyers, like all those who practice a profession, have obligations to their calling which exceed their obligations to the State. Lawyers also have obligations by virtue of their special status as officers of the court. Accepting a court's request to represent the indigent is one of those traditional obligations.

Id. at 1823 (Kennedy, J., concurring.)

importance of a lawyer's ethical duty to represent indigent litigants.[50] In opposition to the majority holding, the dissent, written by Justice Stevens,[51] contended that section 1915(d) rested upon the court's inherent power to compel an attorney's service and the ethical obligation of an attorney was a prerequisite to admittance in the federal bar.[52]

> The relationship between a court and the members of its bar is not defined by statute alone. The duties of the practitioner are an amalgam of tradition, respect for the profession, the inherent power of the judiciary, and the commands that are set forth in canons of ethics, rules of court, and legislative enactments.[53]

Justice Stevens further stated that "a court's power to require a lawyer to render assistance to the indigent is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the bar, and to exercise 'those powers necessary to protect the functioning of its own processes.' "[54] This is another way of saying, as the Court did in *Powell v. Alabama*,[55] that "[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment."[56]

The relationship of attorneys with the court has a long and disputed history.[57] The concept of attorneys as "officers of the court" is generally exalted by federal courts as being rooted in the history of the English legal profession. The Ninth Circuit Court of Appeals relied heavily upon English tradition in *United States v. Dillon*[58] to uphold the constitutionality of requiring court-appointed counsel to subsidize an indigent defendant's legal costs and proceedings to vacate his conviction.

The *Dillon* case represents the extent to which many federal courts have gone in denying compensation to court-appointed attorneys. In *Dillon*, a court-appointed attorney, following proceedings to vacate the judgment of an indigent defendant, applied for compensation pursuant to the district court's invitation. The district court granted the attorney's application for compensation, holding that its order requiring the attorney to serve was a taking of the attorney's

50. *Id.* at 1822-23.
51. Justice Stevens was joined by Justice Marshall, Justice Blackmun, and Justice O'Connor.
52. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1823-26 (Stevens, J., dissenting).
53. *Id.* at 1823 (Stevens, J., dissenting).
54. *Id.* at 1824 (Stevens, J., dissenting)(quoting Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787 (1987)(Scalia, J., concurring)).
55. 287 U.S. 45 (1932).
56. *Id.* at 73.
57. For an excellent and concise historical overview of the lawyer and the legal profession, see R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953).
58. 346 F.2d 633 (9th Cir. 1965).

property for public use, within the meaning of the fifth amendment requiring just compensation. The decision of the district court was appealed and reversed by the Ninth Circuit Court of Appeals.

The *Dillon* Court stated that an attorney's obligation to represent indigents when ordered by the court was "an ancient and established tradition, and that appointed counsel have generally been compensated, if at all, only by statutory fees which would be inadequate under just compensation principles, and which are usually payable only in limited types of cases."[59] Further, the *Dillon* court held that coercive appointments of counsel without just compensation was not a taking under the fifth amendment because "representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court."[60] The *Dillon* court also found that applying for admission to the practice of law evidenced an implied understanding by applicants that as an officer of the court the attorney is obligated to represent indigents for little or no compensation whenever deemed appropriate by the court. "Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.' "[61]

In arriving at the conclusion that attorneys are officers of the court, the court of appeals drew upon portions of the brief of the United States which concluded that the concept of officer of the court comes from English tradition. However, this reliance upon English legal tradition is clearly misplaced.

According to the attorneys for the United States in *Dillon*, a tradition of representation of the poor has existed in England "for nearly half a millennium."[62] Further, the United States asserted that "serjeants-at-law from a very early period might be required by any of these courts [in which they could practice] to plead for a poor man."[63] The commitment of an attorney to serve when ordered by a court was put in unequivocal terms during the seventeenth century by Chief Justice Hale. Chief Justice Hale stated that "if the court should assign [a serjeant] to be counsel, he ought to attend; and if he refuse, we would not hear him, nay, we would make bold to commit him."[64]

The argument of the attorneys for the United States in *Dillon* attempted to analyze the role of modern American attorneys in light of the role played by serjeants-at-law in the English legal system. While

59. *Id.* at 635.
60. *Id.*
61. *Id.*
62. *Id.* at 636 (appendix).
63. *Id.*
64. *Id.* (citing — [*sic*] v. Scroggs, 1 Free. 389, 89 Eng. Rep. 289 (K.B. 1674)).

this analogy may seem reasonable on its face, it in fact attempts to compare two distinct groups.

The evolution of the legal profession in England dates back to the Medieval period, when three distinct professional categories developed: (1) the judges and the serjeants-at-law; (2) the barristers; and (3) the attorneys.[65] In the fourteenth century, significant distinctions existed between these three categories. A major distinction, and perhaps the most important one, was that judicial appointments were reserved exclusively to the serjeants-at-law. Serjeants were required to take an oath of office to serve the King's people and uphold justice, "so that the degree of sergeant was a public office."[66] In order to distinguish themselves from the other two categories of attorneys, serjeants wore a distinctive dress which included a long robe and a white silk coif which they did not remove even in the presence of the King. "They were created by letters patent and were paid a fixed salary by the Crown, doing some of the work of representing the Crown done later by the Attorney General and Solicitor General."[67] Further, serjeants were given exclusive rights to practice in the Court of Common Pleas and were the only category of attorneys allowed to practice before both courts of law and courts of equity. Additionally, serjeants could, and did, demand large fees for their services.[68]

The serjeant's duty to serve developed from his social and political standing. The serjeant was "an officer of the court in the truest sense."[69] However, the place of the serjeant in English history is of little practical use in justifying the holding that American attorneys are officers of the court. While the serjeant was in fact an officer of the court, "[h]e has no counterpart in American practice."[70] Thus, the place of the serjeant in English history is of little relevance to contemporary issues affecting attorneys in the United States. An additional problem surfaces in attempting to compare serjeants in particular, and the English bar in general, to the American legal profession. "Whatever the authority granted to courts by statute, or assumed by them as inherent to their common-law role, that authority may not have been so widely used, and unwilling lawyers, no matter what their rank, may seldom have been actually coerced into donating their services."[71]

The foregoing discussion does not present the entire historical background for the place of the serjeant in the history of the English

65. R. POUND, *supra* note 57, at 82
66. *Id.* at 83.
67. *Id.*
68. Shapiro, *The Enigma Of The Lawyer's Duty To Serve*, 55 N.Y.U. L. REV. 735, 746 (1980).
69. *Id.*
70. *Id.*
71. *Id.* at 746-47.

legal profession; however, "enough has been said to conclude that the case for compulsory, gratuitous service by American lawyers—in particular cases or on a broader scale—cannot be based in substantial part on English tradition."[72]

The conclusion that the coerced appointment of counsel by federal courts cannot rest upon the English tradition dictates that the tradition of court-appointed counsel in America be briefly examined. As noted previously, the *Dillon* court exalted "the obligation of the legal profession to serve indigents on court order [as] an ancient and established tradition."[73] However, the issue does not appear to have been settled at any point in American history, perhaps with the exception of the earliest period of colonization.

In the early Colonies the question of court-appointed counsel did not arise essentially because "[l]awyers as a class were very unpopular in the early Colonial history."[74] In fact, lawyers were viewed as unnecessary in the earlier Colonial period and attempts were made to work out legal problems among groups based on the common law as interpreted by the common man. This "common man interpretation" approach was so entrenched in the Colonial viewpoint that legal training was often deemed unnecessary or even undesirable in a judge.[75]

During the period between the early seventeenth century and the Revolution, the Colonies wrestled with the inadequacies of a system in which every man was his own attorney. As the Colonies developed, so did the need for a trained legal profession. "By the time of the Revolution the legal profession in most of the Colonies had become well established in public estimation, well educated, and well qualified by study of law."[76]

The period following the Revolution up to the period of the Civil War saw the development of an established bar for the American legal profession. However, with respect to court-appointed representation

72. *Id.* at 749.

73. United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965).

74. R. POUND, *supra* note 57, at 132.

75. *Id.* at 132 n.3. According to Pound,

> [s]even of the eleven Chief justices of New York from 1691 to 1778 were not trained lawyers. In appointing judges "it was considered an object to embrace as many various callings in life as the number of judges would admit." Of the 33 who sat on the bench of the highest court of Massachusetts from 1692 to 1775, as appears from the individual sketches in Washburn, . . . only nine had some degree of legal training. In 1764 the Governor of New Jersey wrote that the "gentlemen sitting as judges in the courts of the colonies were not and could not be expected to be lawyers learned in the law." Until the era of the Revolution it was not "deemed necessary or even advisable to have judges learned in the law."

Id. (citations omitted).

76. *Id.* at 163.

for civil litigants, "[b]eyond a few statutes in contemporary commentaries, the problem of the lawyer's duty does not appear to have attracted a great deal of attention until the later part of the nineteenth century—when lawyers began objecting to assignments to serve without pay."[77]

In civil litigation "[o]rganized legal aid did not make its first appearance until the late nineteenth century."[78] It was not until 1892 that Congress gave federal courts discretion to "request" an attorney to represent an indigent civil litigant.[79] Additionally, there were few states that had ever done much to aid the poor in civil litigation, and the courts of only twelve states had authority to assign attorneys in such cases. Even in the states in which the court had the clear authority to appoint counsel for indigent civil litigants, the power to appoint was rarely exercised.[80]

As early as 1854, the Indiana Supreme Court concluded that the coerced appointment of attorneys to represent indigent civil litigants was unfair to attorneys and unlikely to succeed in insuring representation for the poor.[81] The court noted that any citizen put in jeopardy of life or liberty has a constitutionally guaranteed right to counsel, a right that cannot be eliminated simply because the citizen is too poor to employ counsel. "The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public. And the only question is, who shall pay?"[82] The public, the court reasoned, should not be allowed to neglect its duty to provide representation for the poor by transferring that duty to the legal profession. "An attorney of the Court is under no obligation, honorary or otherwise, to volunteer his services. As a matter of private duty, it devolves as much on any citizen of equal wealth to employ counsel in the defence, as on the attorney to render service gratuitously."[83] Additionally, "[i]f the state has not made provision for the defence of poor prisoners, it has presumed and trespassed unjustly upon the rights and generous feelings of the bar; levying upon that class a discriminatory and unconstitutional tax."[84] The court concluded that it was not the duty of the legal profession to bear the burden of representation for poor litigants simply because the public has neglected to do so. "Yet is the defence of the poor an imperative duty resting somewhere. We have seen that it does not devolve

77. Shapiro, *supra* note 68, at 749-50.
78. *Id.* at 752.
79. 28 U.S.C. § 1915(d)(1988).
80. Shapiro, *supra* note 68, at 752.
81. Webb v. Baird, 6 Ind. 13 (1854). *See also* Hall v. Washington County, 2 Greene 473 (Ia. 1850); County of Dane v. Smith, 13 Wis. 654 (1861).
82. Webb v. Baird, 6 Ind. 13, 18 (1854).
83. *Id.*
84. *Id.*

upon a private citizen. It must, therefore, devolve upon the public or some portion of it."[85]

Four years prior to the Indiana Supreme Court's decision that an attorney has a right to reasonable compensation, the Iowa Supreme Court made a similar decision.

> If attorneys, as officers of the court, have obligations under which they must act professionally, they also have rights to which they are entitled, and which they may justly claim in common with other men in the business of life. Among these rights, that of reasonable compensation for services rendered in their profession is justly to be considered.[86]

The Iowa court held that the mere fact that an attorney is an officer of the court did not obligate an attorney to provide legal representation without compensation. "His time, labor and professional skills are his own. He should not be required to bestow them gratuitously at the will of the court, any more than should any other officer."[87]

The most interesting point made by the Iowa court was its interpretation of attorneys as officers of the court. In its analysis of the place of American attorneys in relation to the court, it concluded that the tradition did not rest upon the place of the serjeants in English history; American historical development lacks the cohesiveness to conclude that American attorneys should be obligated to render legal services without compensation. However, the Iowa Supreme Court identified attorneys as officers of the court. What is significant is that the court did not use this identification to justify uncompensated legal services by court-appointed counsel. Instead, the court compared the status of an attorney with other court officials who are compensated for services rendered to the court.[88] The court concluded that to require attorneys, whether or not they are officers of the court, to represent the poor without compensation is an unconstitutional tax upon their services.[89]

Moreover, the *Hall* court was well aware of the inadequacies of requiring the legal profession to absorb the cost of representation of the poor. In fact, both the Indiana and Iowa courts recognized that when a social obligation exists, such as providing legal services to the poor,

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85. *Id.* at 18-19.
86. Hall v. Washington County, 2 Greene 473, 476 (Ia. 1850).
87. *Id.* The Nebraska Supreme Court recently made a similar holding in State v. Ryan, 233 Neb. 151, 444 N.W.2d 656 (1989), in which it declared that the state district courts must provide fair compensation to attorneys appointed to represent indigent prisoners, reasoning that the obligation to provide counsel to indigent prisoners was a societal obligation and should not be placed upon individual attorneys. *Id.* at 159, 444 N.W.2d at 661.
88. Modern examples of these court officials are bailiffs, clerks and court reporters who work as employees under a wage or salary agreement. Because the court can require their services as employees of the government, it can do so without additional compensation, for assistance to the indigent.
89. Hall v. Washington County, 2 Greene 473, 476 (Ia. 1850).

that obligation should not be borne by any single segment of society and, more importantly, society should not be allowed to ignore its obligations by doing so.[90]

The federal court system of today ought to examine its "long history and tradition" more carefully before placing upon the legal profession an obligation which ought to be borne by society as a whole. However, as will be discussed in the following section, rather than reassessing the "officer of the court" designation, the federal courts have used the doctrine to justify denying an attorney the constitutional right to refuse uncompensated court appointments.

B. Officer of the Court Doctrine as a Justification for Denial of Constitutional Rights

The constitutional right most directly implicated by mandatory court appointments is the right to compensation. An in-depth examination of the takings and involuntary servitude clauses of the federal constitution is beyond the scope of this Note. Nevertheless, an examination of how federal courts have held that compelled service of attorneys without compensation is not prohibited under the fifth amendment will be beneficial to this discussion.[91] In *United States v. Dillon*[92], the Ninth Circuit refused to extend the protection of the fifth amendment to court-appointed attorneys. The Ninth Circuit justified this holding by stating that compulsory service was not "a taking of [an attorney's] services without just compensation when he performs an obligation imposed upon him by ancient traditions of his profession and as an officer assisting the court in the administration of justice."[93]

The decision of the Ninth Circuit can be stated as: It is not a taking to require an attorney to serve without compensation because he is already required to serve as an officer of the court. Put more simply, an attorney is obligated to serve because he is obligated to serve. This circular reasoning is of great value to federal courts because it is virtually immune from attack. Or is it? As was noted in the section discussing the history of the doctrine of officer of the court, the doctrine itself is difficult to trace and almost certainly is more judicial rhetoric than historical fact. Despite the questionable historical basis of compelled service, federal courts, as in *Dillon*, have justified the taking of

90. Webb v. Baird, 6 Ind. 13 (1854); Hall v. Washington County, 2 Greene 473 (Ia. 1850).

91. The fifth amendment to the United States Constitution prohibits the taking of property "for public use without just compensation." U.S. CONST. amend. V. The thirteenth amendment to the United States Constitution abolished involuntary servitude, except as punishment for crime. U.S. CONST. amend. XIII, § 1.

92. 346 F.2d 633 (9th Cir. 1965).

93. *Id.* at 636.

compensation from one group of citizens (attorneys) for the benefit of another (indigent defendants and litigants).[94]

However, while federal courts rely upon the officer of the court doctrine to escape the takings and involuntary servitude questions raised by the fifth amendment, they abandon this view when an attorney is asked to provide the costs of defense in litigation. The protections in the fifth amendment are applicable to the states through the fourteenth amendment and the doctrine of incorporation.[95] The Eighth Circuit in *Williamson v. Vardeman*,[96] addressed the question whether the courts of Missouri could, consistently with the fourteenth amendment, compel attorneys to represent indigent defendants when the state legislature failed to appropriate funds to compensate attorneys for their services and to pay the necessary expenses of defense.[97]

In *Williamson*, an attorney was appointed to represent an indigent defendant who had been charged with four counts of selling a controlled substance. The court stated in its appointment order that the attorney might not receive payment or recover his expenses because funding for such appointments was exhausted. Faced with the prospect of serving without compensation and the additional prospect of providing the cost of defense for the defendant, the attorney refused to serve. The Missouri state court held the attorney in contempt and sentenced him to ten days in prison. On appeal, the Missouri Supreme Court denied any relief for the attorney. Turning to the federal court system, the attorney filed a petition for habeas relief in the federal district court. However, the federal district court dismissed the petition and the attorney appealed to the Eighth Circuit.

On appeal Williamson asserted, first, that the requirement that he render services without compensation violated the thirteenth amendment prohibition of involuntary servitude and constituted a taking of liberty and property without due process; and, second, that the requirement that he provide legal expenses incident to the defense of the accused similarly violated the due process clause.[98]

The Eighth Circuit held that "[a]ttorneys may constitutionally be compelled to represent indigent defendants without compensation. The thirteenth amendment has never been applied to forbid compulsion of traditional modes of public service even when only a limited segment of the population is so compelled."[99] Moreover, the Eighth

94. *See* Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984); Williamson v. Vardeman, 674 F.2d 1211 (8th Cir. 1982).

95. U.S. CONST. amend. XIV, § 1; Duncan v. Louisiana, 391 U.S. 145 (1968)(due process clause of fourteenth amendment incorporates fundamental rights of the first eight amendments).

96. 674 F.2d 1211 (8th Cir. 1982).

97. *Id.* at 1212.

98. *Id.* at 1213.

99. *Id.* at 1214. *See* Hurtado v. United States, 410 U.S. 578, 589-90 n.11 (1973)(wit-

Circuit stated that

> [t]he vast majority of federal and state courts which have addressed the due process issue have decided that requiring counsel to serve without compensation is not an unconstitutional taking of property without just compensation.[100] These courts reason that compulsion of service is not a taking because there is a preexisting duty to provide such service.[101] The source of this duty is a lawyer's status as an officer of the court.[102]

Relying upon the Ninth Circuit's holding in *United States v. Dillon*[103] and the United States Supreme Court's decision in *Powell v. Alabama*,[104] the Eighth Circuit concluded "that compulsion of services without compensation . . . does not contravene the federal Constitution."[105]

However, while the *Williamson* court concluded that the officer of the court doctrine justified compelled appointments of attorneys without compensation, it was not willing to extend the doctrine to compel an attorney to provide the cost of defense or litigation. The court held that "[r]equiring lawyers to pay the necessary expenses of criminal defense work without reimbursement is . . . constitutionally distinct from merely compelling lawyers to provide their services."[106] While the court concluded that requiring attorneys to pay "costs" is unconstitutional, the reasoning used by the Eighth Circuit reveals the weakness of the assertion that appointments without compensation are not in conflict with the Constitution. The court reasoned as follows:

> While we understand that in many cases, because of lost opportunities and payment of fixed costs, the burden of providing services without compensation is comparable to that of paying expenses, lawyers have no duty to pay expenses. The class of lawyers has no more obligation to pay such expenses than

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nesses); Selective Draft Law Cases, 245 U.S. 366, 390 (1918)(draft); Butler v. Perry, 240 U.S. 328, 333 (1916)(work on public roads); Bertelson v. Cooney, 213 F.2d 275, 277-78 (5th Cir.), *cert. denied*, 348 U.S. 856 (1954)(special draft of medical personnel).

100. *See, e.g.*, Tyler v. Lark, 472 F.2d 1077, 1078-79 (8th Cir.), *cert. denied*, 410 U.S. 910 (1973); United States v. Dillon, 346 F.2d 633, 635-36 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); Jackson v. State, 413 P.2d 488, 489-90 (Alaska 1966); State v. Superior Court, 2 Ariz. App. 466, 409 P.2d 750, 755 (1966); Bibb County v. Hancock, 211 Ga. 429, 86 S.E.2d 511, 518 (1955); Weiner v. Fulton County, 113 Ga. App. 343, 148 S.E.2d 143, 146 (1966), *cert. denied*, 385 U.S. 958 (1966); Warner v. Commonwealth, 400 S.W.2d 209, 211-12 (Ky. 1966), *cert. denied*, 385 U.S. 858 (1966); State v. Clifton, 247 La. 495, 172 So. 2d 657, 667 (1965); Daines v. Markoff, 92 Nev. 582, 555 P.2d 490, 493 (1976); Scott v. State, 216 Tenn. 375, 392 S.W.2d 681, 685-87 (1965); Ruckenbrod v. Mullins, 102 Ut. 548, 133 P.2d 325 (1943); Presby v. Klickitat County, 5 Wash. 329, 31 P. 876 (1892). *But see* Blythe v. State, 4 Ind. 525 (1853)(state constitution's takings clause); Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. 1972); Bedford v. Salt Lake County, 22 Ut. 2d 12, 447 P.2d 193 (1968).

101. Hurtado v. United States, 410 U.S. 578 (1973).

102. Williamson v. Vardeman, 674 F.2d 1211, 1214-15 (8th Cir. 1982).

103. 346 F.2d 633 (9th Cir. 1965).

104. 287 U.S. 45 (1932).

105. Williamson v. Vardeman, 674 F.2d 1211, 1215 (8th Cir. 1982).

106. *Id.*

> any other class of citizens. Compelling individual attorneys to bear such costs raises serious due process issues.[107]

In this passage the Eighth Circuit is trying to distinguish between a court's ability to compel legal services without compensation, which it deems constitutional, and compelling an attorney to bear the costs of defense, which it held unconstitutional. In fact, the lost compensation of fees in many cases represents a greater burden to bear by the attorney than the "costs" of defense in litigation. The Eighth Circuit states that lost compensation is justified in light of an attorney's duty as an officer of the court. On the other hand, the court also recognizes that attorneys are no more obligated to provide the expenses of defense than any other class of society.[108] This distinction between lost compensation and compulsory payment of expenses employed by the *Williamson* court is arbitrary and rests upon conclusory reasoning. The flaw in the court's reasoning evidences that the federal courts should not be overly confident in the viability of the officer of the court doctrine.

If in fact the officer of the court doctrine grants a federal court the power to compel uncompensated legal services and if lawyers have indeed "consented to, and assumed this obligation,"[109] it logically follows that attorneys may also be compelled to provide the cost of such service without presenting "serious" due process, takings or involuntary servitude questions. It would seem reasonable that a federal court could demand the attorney's services, as an officer of the court, including his financial support to further the aims of the judicial system.

In summary, the officer of the court doctrine provides a federal court with a necessary premise to justify uncompensated service to the state. Absent this premise, it is difficult to place upon the attorney the obligation to provide legal services without compensation. Whatever "social" benefits the officer of the court doctrine provides, the policy cannot withstand constitutional scrutiny. In fact, it should be evident that the doctrine itself probably cannot pass a constitutional examination. As the Supreme Court stated, "[i]t is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "[110]

The use of the officer of the court doctrine to compel attorneys to serve raises serious constitutional questions. Moreover, the use of the

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107. *Id.*

108. *Id.*

109. United States v. Dillon, 346 F.2d 633, 635 (8th Cir. 1965).

110. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318-19 (1987)(quoting Armstrong v. United States, 364 U.S. 40, 48 (1960)).

doctrine by the courts may present attorneys with an ethical dilemma. The following discussion will briefly examine this dilemma.

C. Officer of the Court Doctrine and a Lawyer's Responsibilities to the Legal Profession: The Horns of an Ethical Dilemma

Justice Kennedy, concurring with the decision in *Mallard*,[111] stated that "[l]awyers, like all those who practice the profession, have obligations to their calling which exceed their obligations to the State."[112] Further, Justice Kennedy concluded that lawyers have obligations to the profession of law and to the court by virtue of their "special status as officer of the court."[113] This status as an officer of the court and the lawyer's duty to improve the legal profession obligates the lawyer to accept "a court's request to represent the indigent."[114] Additionally, Justice Stevens, writing for the dissent, stated that "[t]he relationship between a court and the members of its bar is not defined by statute alone."[115] The duties of the lawyer "are an amalgam of tradition, respect for the profession, the inherent power of the judiciary, and the commands that are set forth in canons of ethics, rules of court, and legislative enactments."[116]

An attorney is, or should be, aware that the profession of law brings with it the "obligation" to represent clients who cannot afford counsel and without representation might not otherwise have the full protections of the Constitution. This willingness to represent the indigent distinguishes the legal profession from other professions. The legal profession's commitment to pro bono service is recognized by the American Bar Association's *Model Rules of Professional Conduct*:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.[117]

However, an attorney's ethical obligation to render pro bono service is not equivalent to a federal court's power to compel an unwilling attorney to represent an indigent without compensation. In fact, as this Note will argue, a federal court's insistence that an attorney represent an indigent against the attorney's "ethical objections" may com-

111. Mallard v. United States Dist. Court, 109 S. Ct. 1814 (1989).
112. *Id.* at 1823 (Kennedy J., concurring).
113. *Id.*
114. *Id.*
115. *Id.* (Stevens, J., dissenting).
116. *Id.*
117. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1989)[hereinafter MODEL RULES].

pel an attorney to violate ethical rules, and may also constitute a violation of the *Code of Judicial Conduct* by the appointing judge.

The *Model Rules* provide that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[118] This rule operates to maintain the integrity of the legal profession, as well as ensuring that the indigent client is competently represented.

When an attorney is ethically compelled to decline a court appointment because of the attorney's belief that she is not competent to handle a case, and the court nevertheless refuses to allow the withdrawal, the attorney is confronted with a serious ethical and professional dilemma.[119] Should the attorney obey the court order and violate the ethical obligation to provide competent legal services, or should she refuse to follow the court order and almost certainly face a charge of contempt? To rephrase the question, in light of the foregoing discussion, if a court concludes that an attorney is an officer of the court, does this conclusion justify the court's power to compel the attorney's service, when it forces the attorney to violate her ethical obligations?

The conflict of loyalties between competent representation and obligations imposed by the court may give rise to additional concerns. "A lawyer should exercise independent professional judgment on behalf of a client."[120] As the Connecticut Supreme Court has stated: "When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion."[121] In a case where the attorney must decide between a court's compelled appointment and the concerns of professional incompetence, the attorney is confronted with the dilemma of conforming to the wishes of two masters.

The client must receive competent representation to protect his rights and to preserve the integrity of the legal profession. The court, in deciding when an attorney is competent to handle a case, is the master of that attorney's freedom of choice. Within the guidelines of a lawyer's professional responsibility in an adversary system it is, and must be, clear that the client is master. The indigent client should not be compelled by a court to rely upon the representation of an attorney not competent in the area of law being litigated. Issues regarding con-

118. *Id.* Rule 1.1. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1983)[hereinafter MODEL CODE](a lawyer should represent a client competently); MODEL CODE EC 6-1 (a lawyer should act with competence and proper care in representing clients).

119. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1817 (1984).

120. MODEL CODE, *supra* note 118, Canon 5.

121. Grievance Comm. v. Rattner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964).

flicts of interest may also arise within the context of court appointments. The *Model Code* states that "a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interest."[122] While this rule is generally applied in the context of attorneys acquiring a property interest in their client's action, the scope of the rule may be implicated when an attorney is appointed to represent an indigent client.

The economic realities of the practice of law have been exploited by some, recognized by others, and ignored by an idealistic few. Yet the terms "client development" and "billable hours" are uniformly used and understood by all attorneys. Even the most altruistic in the legal profession recognize that providing legal services is in many respects a business, and that attorneys are business people who must support themselves and their families just as other individuals in society. For those attorneys who need paying clients to maintain their income, a court appointment can mean the loss of needed income and, to the extent that their time is consumed by non-billable services, the loss of business opportunities.

Although an attorney should assist in improving the legal system by providing free legal services for those unable to pay,[123] it is also true that an attorney's own financial need for compensation can influence him to pursue a court-appointed action less vigorously in order to concentrate on profitable cases. An attorney may also be influenced to settle for an unduly low amount just to have the "freebie" case over.

The attorney's financial concerns must be balanced against his responsibility to provide legal services for the indigent, and not all circumstances will support a valid conflict of interest claim. However, when economic and personal concerns arise as a result of a court-appointment, the attorney's independent judgment cannot be guaranteed. In such cases, courts must not hide behind the idealistic image of "officers of the court" faithfully performing their duties, while being blind to the economic realities of the practice of law.

When ethical concerns are at issue, compelling an attorney to represent an indigent client not only places the attorney in a dilemma, but also places the appointing judge at the heart of an ethical violation. The *Code of Judicial Conduct* provides that "[a] judge should be faithful to the law and maintain professional competence in it."[124] It also provides that, "[a] judge should diligently discharge his administrative responsibilities [and] maintain professional competence in judicial administration."[125]

122. MODEL CODE, *supra* note 118, DR 5-101(A).
123. *Id. See also* MODEL CODE, *supra* note 118, EC 2-25.
124. CODE OF JUDICIAL CONDUCT Canon 3(A)(1)(1989).
125. *Id.* Canon 3(B)(1).

A judge's appointment of an attorney to a case in an area of law where the attorney has little or no experience, or to a case which the attorney cannot handle due to personal or economic concerns, violates the judge's ethical responsibility to "maintain professional competence" in the administration of justice.[126] If a court compels an attorney's services, will the judge be subject to disciplinary proceedings or be jointly responsible for the attorney's malpractice?[127] Surely if an attorney is compelled to perform a job he is clearly unqualified to provide, any liability should not be borne by the attorney alone.

The foregoing discussion does not overlook the importance of providing competent legal counsel for the protection of constitutional rights, but rather focuses on the problems of assigning that duty to an uncompensated element of society. Courts have attempted to assign civil rights cases, while recognizing ethical and practical concerns. Courts have assigned such cases only to litigation attorneys (to ensure that the attorney is able to perform the services needed), or to attorneys associated with larger firms (to reduce the economic impact of the uncompensated case), or to attorneys located near the federal courts (to lessen the practical problems of time consumed in travel). Each of these qualifying factors will further diminish the number of attorneys called upon to protect the constitutional rights of the poor; as a result a subsection of the practicing bar will carry the load of the entire bar, and more importantly, of society as a whole.

Constitutional rights and the guarantee of those rights, while certainly an issue within the practicing bar, is the compelling concern of society as a whole. The present system of protecting the constitutional rights of indigents places this obligation on attorneys, not on society. As Justice Holmes stated:

> In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[128]

Placing the practical and economic burdens of protecting constitutional rights upon the practicing bar alone creates not only ethical dilemmas but, where service is compelled and uncompensated, the loss of the attorney's constitutional rights. Further, the rights of the needy client may be jeopardized. The American Bar Association has recognized that "[w]hen members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the service rendered may be lowered, the welfare of the profession

126. *Id.*

127. *Id.* Canon 3(B)(3)(a judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware).

128. Pennsylvania Coal v. Mahon, 260 U.S. 393, 416 (1922).

injured and the administration of justice made less efficient."[129]

With the rights and concerns of both counsel and client at issue, it is imperative that Congress and the bar work to solve these problems by providing compensation for those requesting it. As forecast in the *Model Code*, the efforts of individual lawyers to provide free legal services "are often not enough to meet the need."[130]

> Lawyers have peculiar responsibilities for the just administration of the law, and these responsibilities include providing advice and representation for needy persons. To a degree not always appreciated by the public at large, the Bar has performed these obligations with zeal and devotion. The Committee is persuaded, however, that a system of justice that attempts, in mid twentieth century America, to meet the needs of the financially incapacitated accused through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate. . . . A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance. . . . We believe that fees for private appointed counsel should be set by the court within maximum limits established by the statute.[131]

IV. CONCLUSION

The legal profession has a long history of helping those who cannot afford to pay. Many attorneys provide this "free" service out of a sense of commitment to the community, pride in their profession, and the desire to promote justice. It seems ironic that this long tradition of providing legal services to indigents has become an "obligation" by which the federal courts can strip attorneys of their protected rights and impose upon them ethical dilemmas.

The system of court appointments contradicts common sense methods for encouraging altruism. Children are not taught to give by forcing the decision upon them; the forced decision destroys an element essential for inculcating a concern for the community: the freedom to choose to help others. Children learn to give freely by experiencing the personal satisfaction of helping, and by recognizing that this satisfaction outweighs the value of what they gave. Unfortunately, not all members of the legal profession have or will learn this lesson and, accordingly, payment is necessary to ensure that adequate help is available to protect the constitutional rights of the needy. But for those who choose to give their services, the choice of when, how, and to whom the services are given should remain theirs. Simply stated, the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and per-

129. ABA Comm. on Professional Ethics and Grievances, Formal Op. 302 (1961).
130. MODEL CODE, *supra* note 118, EC 2-25.
131. ATTORNEY GENERAL'S COMM. ON POVERTY & THE ADMIN. OF FED. CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 41-43 (1963).

sonal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."[132] The service, however, must be based on choice rather than coercion. Retention of the present system of court appointments will result, not in a freely made choice of service, but in an obligation of service that is contrary to the spirit of the *Model Rules* and *Model Code*, and cannot be justified either by the Constitution, or by the title "officer of the court."

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132. MODEL CODE, *supra* note 118, EC 2-25.